First Ministers' Conference on Aboriginal Rights and the Constitution

Ottawa

March 15-16, 1983

Contents

Page

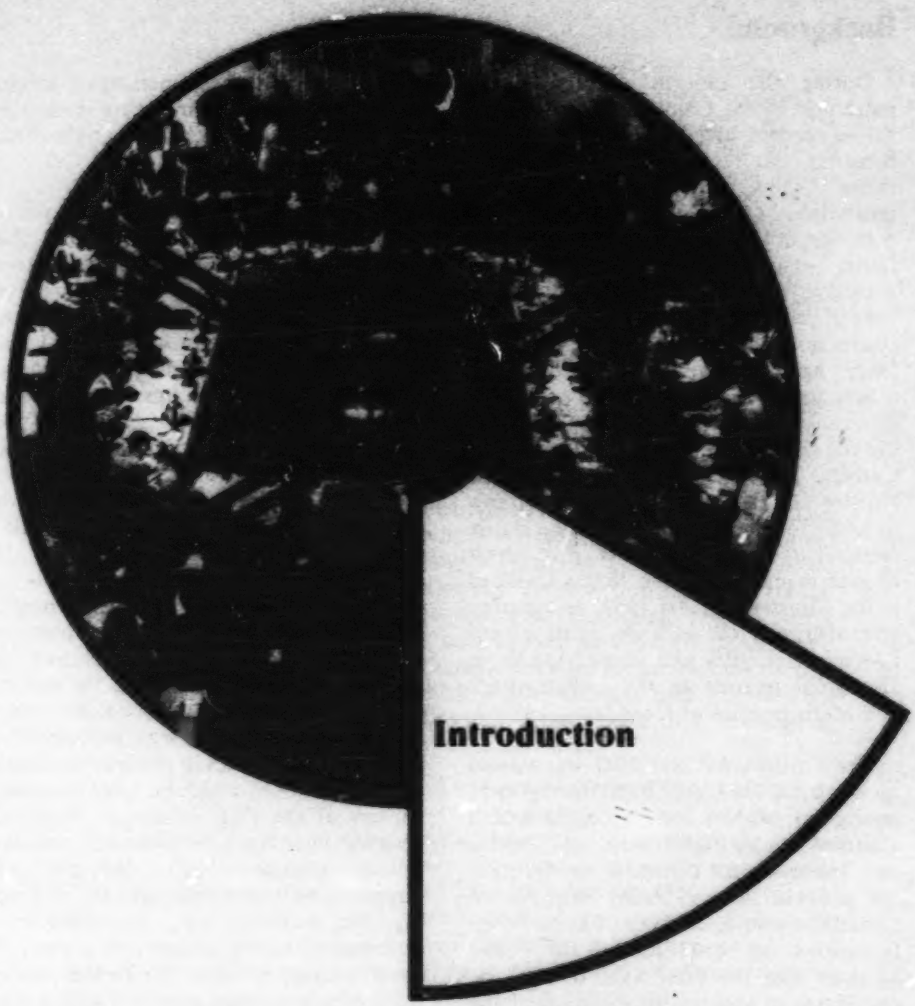
Introduction 3

1983 Constitutional Accord 9

Aboriginal Rights and the Constitution: GNWT Position Paper 17

Sessional Paper: Aboriginal Rights and the Constitution 23

Press Release: Executive Committee Supports Constitutional Accord 29



Introduction

The First Ministers' Conference on Aboriginal Rights and the Constitution was held in Ottawa March 15-16, 1983. This historical event marked the first time that aboriginal people, through their elected leaders, were afforded an opportunity to participate in the Canadian constitutional process on matters that affect them. Coincidentally, it was also significant that for the first time, the elected representatives of Yukon Territory and the Northwest Territories were invited to take part in constitutional talks.

The First Ministers' Conference concluded with an agreement entitled "1983 Constitutional Accord on Aboriginal Rights". This Accord was signed by the leaders of the federal government, the provincial governments with the exception of Quebec, the two territorial governments and the elected representatives of four native organizations. It addresses some of the agenda items which were raised by native leaders during the preparatory meetings leading up to the conference and provides for a continuing forum to deal with those issues which were not resolved.

Background

During the months preceeding the patriation of the Canadian Constitution, native leaders had pressed strongly for constitutional recognition of aboriginal rights. Their efforts met with initial success when it was announced in April, 1981 that the draft constitution contained a clause which recognized and affirmed aboriginal rights. However, in November, 1981 in order to reach a federal-provincial consensus, this section was dropped. Once again native organizations and others urged the federal and provincial governments to include a clause recognizing the rights of the aboriginal people of Canada. The Legislative Assembly of the Northwest Territories travelled to Ottawa to lobby for the reintroduction of a clause recognizing aboriginal rights. As a result of such demands, section 35 was included in the *Constitution Act 1982*, recognizing and affirming the existing rights of the aboriginal peoples and identifying those aboriginal peoples as the Indian, Inuit and Metis peoples of Canada.

The *Constitution Act 1982* was passed on April 17, 1982. Although the rights of aboriginal peoples were recognized and affirmed, those rights were not spelled out. However, the *Constitution Act 1982* did provide for the Prime Minister of Canada to convene a constitutional conference to be comprised of the Prime Minister and the First Ministers of the provinces, to address the question of the rights of the aboriginal people. It was further specified that representatives of the aboriginal people were to be invited to participate in the conference. The Prime Minister of Canada was also allowed to invite the elected representatives of the governments of the Yukon Territory and the Northwest Territories to take part as well.

In preparation for the Constitutional Conference, preliminary meetings of officials began in October of 1982 to attempt to formulate an agenda to serve as the working document for the First Ministers' meeting. The officials of the Government of the Northwest Territories, together with officials of the federal and provincial governments and representatives of the aboriginal organizations participated. At these meetings, various issues were submitted by native leaders as being suitable for inclusion on the final agenda.

In November of 1982, after consultation with native organizations of the Northwest Territories, the Executive Committee tabled in the Legislative Assembly, the paper — "Aboriginal Rights and the Constitution". This document was designed as a preliminary discussion paper to address some of the issues which had been raised at the preparatory meetings up to that time. The Executive Committee agreed to return to the next session of the Legislative Assembly with a further paper once the issues had fully crystallized.

The paper stressed a number of points including the fact that since the question of aboriginal rights was so complex, it was unrealistic to expect that the matter would be resolved in a two day conference. Therefore, it was necessary to provide for an ongoing process to ensure that talks would continue after the conclusion of the First Ministers' meeting. This was important, because the *Constitution Act 1982* provided for only one conference to be held within one year of April 17, 1982, and there was a legitimate concern among native leaders that without a constitutional mandate for further talks, the conference might conclude with a majority of items unresolved.

The paper also recommended that rights which were negotiated between native organizations and federal, provincial and territorial governments should receive constitutional recognition. As well, the paper recommended that amendments be made to the Constitution to provide that future amendments, relating to aboriginal rights, should not be made without the consent of native organizations and that the Constitution provide for aboriginal people to have the right to preserve and enhance their culture and language.

In addition to officials' meetings, two meetings of elected ministers were held to further refine the agenda. At the ministers' meeting held at the end of February, 1983, an agenda was jointly submitted by the Inuit Committee on National Issues, the Native Council of Canada and the Assembly of First Nations. This agenda was adopted by the ministers and recommended to the First Ministers as the working document for the conference.

In early March, 1983, the GNWT Executive Committee tabled a sessional paper dealing with the issues which had surfaced in the course of the preparatory meetings. This paper — among other things — supported the aboriginal peoples' position to remove the word "existing" from section 35. It also recommended that aboriginal rights apply equally to male and female persons and reiterated the need for an ongoing process which would include, both future First Ministers' Conferences and meetings at the officials' level.

The paper also stated that if an Accord were to be signed, it should include — as one of its terms - a commitment on the part of governments to refer matters contained in the Accord, including the entrenchment of an ongoing process, to their respective legislatures in order to promote the passage of a resolution to amend the Constitution.

As well, the paper outlined alternatives to the repeal of section 42 (1) (e) and (f). It has been the position of the Government of the Northwest Territories that these sections which deal with the extension of provinces into the territories and the creation of new provinces should be repealed. Although the federal government supported the repeal of both sections, the provinces resisted the attempt to limit the power which they had acquired under the Constitution. The Government of the Northwest Territories suggested alternative wording to these sections which would require the consent of the GNWT prior to any provincial boundary extension into the territories and to provide for a forum to allow territorial participation in any discussions dealing with the creation of new provinces.

The Conference

The First Ministers' Conference was held in Ottawa on March 15-16, 1983. In addition to the Prime Minister and the ten provincial premiers, the conference participants included the elected representatives of Yukon Territory, the Northwest Territories and the leaders of the Assembly of First Nations, the Native Council of Canada, the Inuit Committee on National Issues and the Metis National Council. Representing the Government of the Northwest Territories were the Honourable George Braden, Leader of the Elected Executive and Minister of Justice and Public Services; the Honourable James Wah-Shee, Minister for Aboriginal Rights and Constitutional Development and the Honourable Dennis Patterson, Associate Minister for Aboriginal Rights and Constitutional Development.

The Conference received wide advance publicity, thereby giving the Canadian people an opportunity to become familiar with the issues which the aboriginal people saw as being critical to them. The Conference itself was televised live nationally, allowing the public to hear native leaders articulately explain their positions on the agenda items.

The negotiations were intense and at some times difficult. Compromise was necessary by all parties, but as a result of these negotiations consensus was reached on the contents of an Accord. The Government of the Northwest Territories sees the Accord as a major first step in the resolution of the question of aboriginal rights because it represents a recognition, on the part of governments, that it is time to earnestly come to grips with the aboriginal rights question in an attempt to resolve it.

The Accord includes a schedule which sets out certain amendments to be made to the Constitution of Canada, including the entrenchment of the ongoing process. In recognition of the fact that it will be impossible to have amendments made to the Constitution within one year of the date of the Conference, the Accord provides for a further First Ministers' Conference to be held prior to March 15, 1984.

In addition, the Prime Minister has agreed to lay before the Senate and House of Commons, prior to December 31, 1983, a resolution to authorize amendments to the Constitution of Canada. The First Ministers have agreed, as well, to introduce similar resolutions to their respective Legislatures prior to that date. These proposed resolutions provide the following:

1) aboriginal and treaty rights shall apply equally to male and female persons;

2) the treaty rights which are presently given constitutional protection will include rights which have been or will be acquired by land claims settlements;

3) prior to any amendments to the aboriginal rights section of the Constitution being made, a Constitutional Conference will be convened to which will be invited representatives of the aboriginal peoples of Canada; and

4) at least two further First Ministers' Conferences will be held, the first within 3 years of the 17th of April, 1982 and the second within 5 years of the 17th of April, 1982.

The Government of the Northwest Territories views the Conference as a success for a number of reasons. The Accord provides a firm political commitment by the governments of this country to continue a meaningful dialogue with aboriginal leaders on this very important issue. The inclusion of rights which evolve from land claims settlements, as rights which receive constitutional recognition, is of great significance to the people of the north, where land claims negotiations are presently taking place. Although the GNWT had advocated that consent be obtained from aboriginal people prior to any amendment of rights which affect them; the consultative process, through a constitutional conference, will at least ensure those amendments will not be made without the opportunity for aboriginal leaders to express their views in a constitutionally recognized setting.

But perhaps more important than the substantive matters which were resolved, was the spirit of the Conference. Although there was a great deal of hard bargaining, there was a spirit of respect and co-operation which should ensure the success of future talks.

The Future

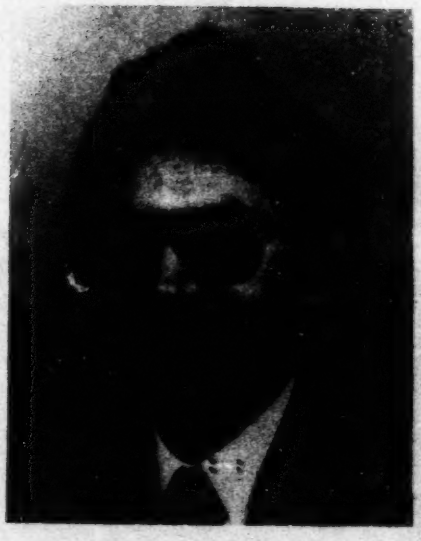
The Accord provides for a second First Ministers' Conference to take place within one year of March 16, 1983. Prior to that time officials' meetings will take place, perhaps in the form of workshops, at which time those agenda items which have not been resolved will be discussed and further refined. The Government of the Northwest Territories is pleased that the issue of section 42 (1) (e) and (f) remains on the agenda for future discussions.

The GNWT will continue to take an active role in these deliberations. It will continue to consult with native organizations of the north and to support their goal of entrenching the rights of the aboriginal people of Canada in the Constitution.

It is recognized that there is a great deal of work to be done. The issues are complex and there are many substantive matters remaining to be addressed. The First Ministers' Conference and the Accord which resulted from it, represent only the first step in this process. Nevertheless, the Government of the Northwest Territories views this as a very positive beginning toward the ultimate resolution of these long standing issues.

George Braden

George Braden
Leader of the Elected
Executive



James Wah-Shee

James Wah-Shee
Minister,
Aboriginal Rights and
Constitutional Development

Dennis Patterson

Dennis Patterson
Assoc. Minister
Aboriginal Rights and
Constitutional Development

1983 Constitutional Accord on Aboriginal Rights

Whereas pursuant to section 37 of the *Constitution Act, 1982,* a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces was held on March 15 and 16, 1983, to which representatives of the aboriginal peoples of Canada and elected representatives of the governments of the Yukon Territory and the Northwest Territories were invited;

And whereas it was agreed at that conference that certain amendments to the *Constitution Act, 1982* would be sought in accordance with section 38 of that Act;

And whereas that conference had included in its agenda the following matters that directly affect the aboriginal peoples of Canada:

Agenda

1. Charter of Rights of the Aboriginal Peoples (Expanded Part II) Including:
   - Preamble
   - Removal of "Existing", and Expansion of Section 35 to Include Recognition of Modern Treaties, Treaties signed Outside Canada and Before Confederation, and Specific Mention of "Aboriginal Title" Including the Rights of Aboriginal Peoples of Canada to a Land and Water Base (including Land base for the Metis)
   - Statement of the Particular Rights of Aboriginal Peoples
   - Statement of Principles
   - Equality
   - Enforcement
   - Interpretation
2. Amending Formula Revisions, Including:
   - Amendments on Aboriginal Matters not to be Subject to Provincial Opting Out (Section 42)
   - Consent Clause
3. Self-Government
4. Repeal of Section 42(1) (e) and (f)
5. Amendments to Part III, Including:
   - Equalization
   - Cost-Sharing
   - Service Delivery

Resourcing of
Aboriginal Governments

6. Ongoing Process, Including Further First Ministers Conferences and the Entrenchment of Necessary Mechanisms to Implement Rights

And whereas that conference was unable to complete its full consideration of all the agenda items;

And whereas it was agreed at that conference that future conferences be held at which those agenda items and other constitutional matters that directly affect the aboriginal peoples of Canada will be discussed;

NOW THEREFORE the Government of Canada and the provincial governments hereby agree as follows:

1. A Constitutional Conference composed of the Prime Minister of Canada and the first ministers of the provinces will be convened by the Prime Minister within one year after the completion of the Constitutional Conference held on March 15 and 16, 1983.

2. The Conference convened under subsection (1) shall have included in its agenda those items that were not fully considered at the conference held on March 15 and 16, 1983, and the Prime Minister of Canada shall invite representatives of the aboriginal peoples of Canada to participate in the discussions on those items.

3. The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

4. The Prime Minister of Canada will lay or cause to be laid before the Senate and House of Commons, and the first ministers of the provinces will lay or cause to be laid before their legislative assemblies, prior to December 31, 1983, a resolution in the form set out in the Schedule to authorize a proclamation issued by the Governor General under the Great Seal of Canada to amend the *Constitution Act, 1982.*

5. In preparation for the constitutional conferences contemplated by this Accord, meetings composed of ministers of the governments of Canada and the provinces, together with representatives of the aboriginal peoples of Canada and elected representatives of the governments of the Yukon Territory and the Northwest Territories shall be convened at least annually by the government of Canada.

6. Nothing in this Accord is intended to preclude, or substitute for, any bilateral or other discussions or agreements between governments and the various aboriginal peoples and, in particular, having regard to the authority of Parliament under Class 24 of section 91 of the *Constitution Act, 1867,* and to the special relationship that has existed and continues to exist between the Parliament and government of Canada and the peoples referred to in that Class, this Accord is made without prejudice to any bilateral process that has been or may be established between the government of Canada and those peoples.

7. Nothing in this Accord shall be construed so as to affect the interpretation of the Constitution of Canada.

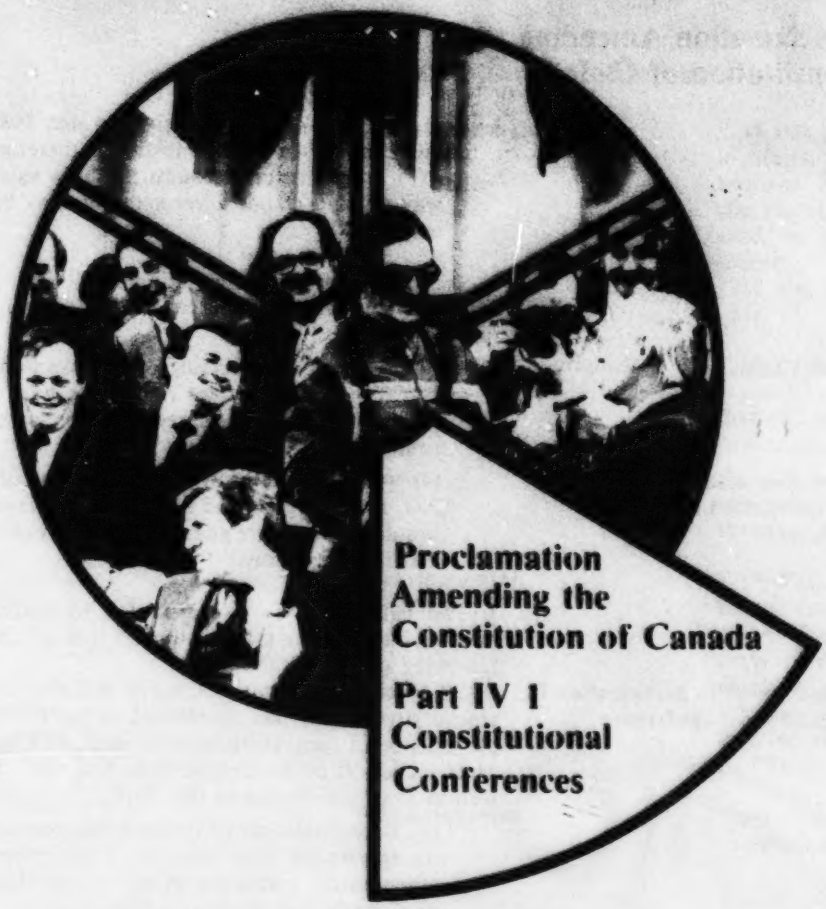
Signed at Ottawa this 16th day of March, 1983 by the Government of Canada and the provincial governments

Signed by the Government of Canada and the Provincial Governments of:

Ontario	British Columbia
Nova Scotia	Prince Edward Island
New Brunswick	Alberta
Manitoba	Newfoundland
	Saskatchewan;

and with the participation of:

Assembly of First Nations	Inuit Committee on National Issues
Metis National Council	Native Council of Canada
Yukon Territory	Northwest Territories



Proclamation Amending the Constitution of Canada

Part IV 1 Constitutional Conferences

Motion for a Resolution to authorize His Excellency the Governor General to issue a proclamation respecting amendments to the Constitution of Canada.

Whereas the Constitution Act, 1982 provides that an amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and resolutions of the legislative assemblies as provided for in sections 38 and 41 thereof;

And Whereas the Constitution of Canada, reflecting the country and Canadian society, continues to develop and strengthen the rights and freedoms that it guarantees;

And Whereas, after a gradual transition of Canada from colonial status to the status of an independent and sovereign state, Canadians have, as of April 17, 1982, full authority to amend their Constitution in Canada;

And Whereas historically and equitably is fitting that the early exercise of that full authority should relate to the rights and freedoms of the first inhabitants of Canada, the aboriginal peoples;

Now Therefore the Senate House of Commons legislative assembly resolves that His Excellency the Governor General be authorized to issue a proclamation under the Great Seal of Canada amending the Constitution of Canada as follows:

Proclamation Amending the Constitution of Canada

1. Paragraph 25(b) of the *Constitution Act, 1982* is repealed and the following substituted therefor:

"(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired".

2. Section 35 of the Constitution Act, 1982 is amended by adding thereto the following subsections:

Land Claims

"(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired".

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

3. The said Act is further amended by adding thereto, immediately after section 35 thereof, the following section:

Commitment to participation in constitutional conference

"35.1 the government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada, and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item"

4. The said Act is further amended by adding thereto, immediately after section 37 thereof the following Part.

Part IV 1
Constitutional Conferences

Constitutional Conferences

37.1(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

Participation of aboriginal peoples

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and

the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

Participation of Territories

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister directly affects the Yukon Territory and the Northwest Territories.

Non-derogation

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

5. The said Act is further amended by adding thereto, immediately after section 54 thereof, the following section.

Repeal of Part IV.1 and this section

"54.1 Part IV.1 and this section are repealed on April 18, 1987."

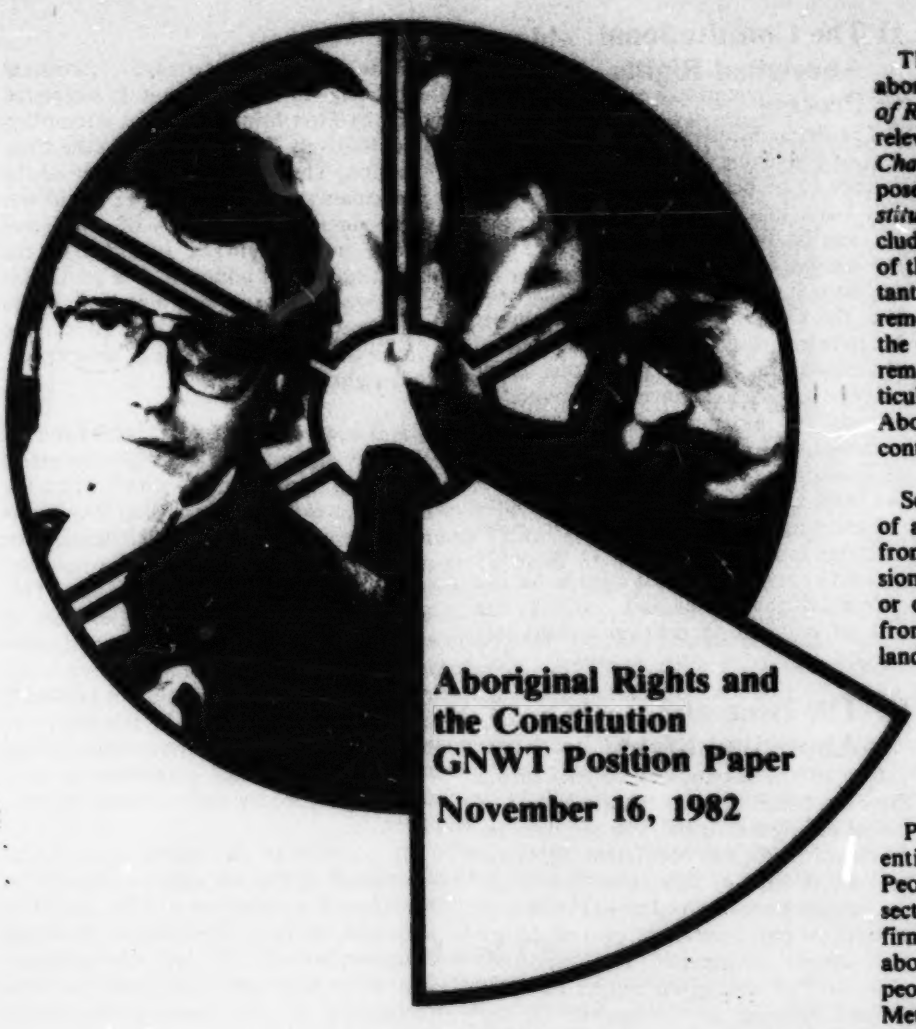
References

6. The said Act is further amended by adding thereto the following section

"61. A reference to the Constitution Acts, 1867 to 1982 shall be deemed to include a reference to the Constitution Amendment Proclamation 1983."

Citation

7. This proclamation may be cited as the Constitution Amendment Proclamation 1983.



Aboriginal Rights and the Constitution GNWT Position Paper November 16, 1982

I Background

The Constitution Act, 1982 came into force on April 17, 1982. Prior to that time, strong and persuasive arguments were advanced by native organizations to have aboriginal rights defined and included in the Constitution. The native organizations took their case to the British Courts in an attempt to block the passage of the *Canada Act* which would enact the *Constitution Act* and terminate the powers of Parliament of the United Kingdom to legislate for Canada. Such attempts were unsuccessful and the *Constitution Act, 1982* was enacted containing three sections dealing with aboriginal rights and aboriginal peoples.

The only section dealing with aboriginal rights contained in the *Charter of Rights and Freedoms* is Section 25. It is relevant to point out that the *Canadian Charter of Rights and Freedoms* is composed of Part I, Schedule B of the *Constitution Act, 1982*. Parts II to VII are included in the Constitution but are not part of the Charter. This could well be important because the Charter provides a remedy for a person whose rights under the Charter are infringed or denied. The remainder of the Constitution, and in particular Part II entitled "Rights of the Aboriginal Peoples of Canada", does not contain such a remedial section.

Section 25 essentially establishes a class of aboriginal rights which are protected from the operation of the Charter's provision. The class contains aboriginal, treaty or other rights including those resulting from the Royal Proclamation of 1763 and land claims settlements.

Part II of the *Constitution Act, 1982* is entitled "Rights of the Aboriginal Peoples of Canada." Section 35, the only section in this part, recognizes and affirms aboriginal and treaty rights of aboriginal peoples and defines aboriginal peoples to include the Indian, Inuit and Metis people of Canada.

Aboriginal rights, as such, are not defined in the Constitution. The *Constitution Act, 1982*, by section 37, does provide that a constitutional conference shall be convened within one year after the Constitution comes into force and that the conference shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada. There is no provision for any further conference after the Section 37 conference.

II The Constitutional Aboriginal Rights Process

The Prime Minister has begun the process of convening a First Ministers' Conference to be held in the spring of 1983. The Government of the Northwest Territories has been invited to send elected representatives to participate in the discussions of the aboriginal rights issue and the Government of the Northwest Territories will be accorded equal representation with the provinces. Three native organizations have been invited to attend: The Assembly of First Nations, representing Indians; the Native Council of Canada, representing the Metis; and the Inuit Committee on National Issues, representing the Inuit peoples. Officials' meetings have been initiated to begin the process of formulating the agenda for the aboriginal rights issue and it will be the task of officials to develop a workable agenda.

III The Issue of Aboriginal Rights

One of the foremost problems facing the First Ministers will be attempting to define aboriginal rights. The question remains as to whether aboriginal rights are inherent or whether they are what aboriginal peoples have received or will receive as a result of past treaties or past or future land claims settlements. The important point is that aboriginal rights, however defined, should be entrenched in the Constitution so that they are not infringed or denied by Federal or Provincial legislation.

Consensus on a "shopping list" of aboriginal rights may be extremely difficult in light of the fact that representation of the Federal Government, the Provinces, two Territories and three native organizations will be attending the conference. The list of aboriginal rights could include subsisting hunting and trapping rights, rights to non-renewable resources, language and cultural guarantees, and guaranteed political rights.

This list is not an exhaustive statement of aboriginal rights and it is suggested that the First Ministers avoid attempting to definitively list these rights in the Constitution. There is a danger that if all the participants at the conference could not agree on the enumeration of aboriginal rights, none might be included in the Constitution. In addition, if a particular right were discussed and not included in the Constitution, it might be argued in the future that it lost its status as an enforceable right for all time.

It is suggested that the Constitution include as many aboriginal rights as could be agreed upon with the proviso that the list is not exhaustive and that any rights which result in land claims settlements or native-provincial negotiations would receive constitutional protection. This would allow for regional differences in the recognition of aboriginal rights; aboriginal rights which are recognized in the Northwest Territories might not be identical to those recognized in the more urbanized provinces, but those rights would receive constitutional protection as they were negotiated by native organizations.

In addition to any agreed upon list of aboriginal rights, the rights contained in the *Royal Proclamation of 1763* should be affirmed. Section 25 mentions the *Royal Proclamation of 1763*, but only to the extent of stating that rights and freedoms recognized by the *Royal Proclamation* shall not be abrogated by the guaranteed rights and freedoms in the Charter. A positive statement affirming the rights recognized by the *Royal Proclamation* is required and should be included in Part II of the *Constitution Act, 1982*.

Recommendation: That the Constitution of Canada enumerate as many aboriginal rights as can be agreed upon at the First Ministers' Conference with the proviso that the list is not exhaustive; that the Constitution further reflect the fact that Constitutional protection be afforded to any rights which may be negotiated by native organizations with Federal, Provincial or Territorial governments; That Part II of the Constitution provide that the rights contained in the *Royal Proclamation of 1763* are recognized and affirmed.

IV Preamble

The present Part II of the Constitution is entitled "Rights of the Aboriginal Peoples of Canada". It is likely that any recognition of aboriginal rights will be inserted in this part. Two basic additions are suggested: The first is to entitle this Part "Charter of Rights of Aboriginal Peoples of Canada", thereby elevating Part II to a status equal to that of the Charter of Rights and Freedoms contained in Part I.

In keeping with the elevation of Part II to a "Charter of Rights of Aboriginal Rights", a preamble should be added to this Part giving recognition to the fact that the aboriginal peoples are the indigenous peoples of Canada. The exact wording of any preamble would have to be agreed upon at the First Ministers' Conference but it should refer to the fact that as the indigenous peoples of Canada, the aboriginal people possess certain fundamental rights and these rights are recognized in the Constitution of Canada.

Recommendation: That Part II of the *Constitution Act, 1982,* be entitled "Charter of Rights of the Aboriginal Peoples of Canada" and that a preamble be added to this part to recognize the aboriginal peoples as the indigenous peoples of Canada.

V Land Claims

Agreements or treaties have been signed between aboriginal peoples and the Federal Government in which the aboriginal peoples relinquish rights in return for certain economic benefits.

The agreements or treaties were said to extinguish aboriginal rights, and the treaties were capable of being altered by legislation. As a result, the native people were left in a powerless position, having forever given up native title in return for benefits which were subject to legislative interference.

Aboriginal rights should not be extinguished. Aboriginal rights are more comprehensive than title to land and these rights should be emphasized as a basis for continual cultural and economic guarantees.

In the provinces, the comprehensive land claims settlements should be a trilateral process between the native organizations, and the Federal and Provincial Governments. In the Northwest Territories, given that the majority of the land is owned by Her Majesty the Queen in Right of Canada, the Territorial Government is not a third party to the land claims settlements but representatives do attend the negotiation meetings. This same degree of involvement should be maintained in all future land claims negotiations. Once the claims are settled and constitutional recognition is given to the negotiated rights, it is necessary to determine how the agreement is to be enforced. In order to avoid a native organization having to resort to a court of law to enforce the terms of the agreement, it is suggested that there be established an Aboriginal Rights Commission in each jurisdiction to oversee the operation of the agreement and ensure that the parties live up to its terms. The Commissions could be composed of members of native organizations and representatives of the Federal and Provincial or Territorial Governments. Recognition of the Commission should be given in the Constitution rather than in provincial legislation.

The Commission would not interfere with the normal negotiation process in land claims settlements, but would assist in the interpretation of the document or determination of issues once the claims process is concluded.

Having separate Commissions for each jurisdiction would allow for the types of regional differences previously referred to in the discussion of the enumeration of aboriginal rights in the Constitution. Persons familiar with the geographic area would be the ones reviewing the document and the conduct of the parties.

Recommendation: That the Constitution provide that land claims settlements in the Provinces should be negotiated on a trilateral basis between native organizations, Federal and Provincial Governments, and

that recognition be given to the Government of the Northwest Territories to continue its involvement in the land claims negotiations involving claims in the Northwest Territories; that Constitutional recognition be given to such rights which arise from the land claims settlements; that the Constitution provide for the establishment of Aboriginal Rights Commissions in each jurisdiction to oversee the operation of land claims settlements.

VI Enforcement of Aboriginal Rights

Reference has been made to the fact that Section 24 of the Charter provides that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court to obtain a remedy. It has been pointed out that Part II, which deals with aboriginal rights, is not part of the *Charter of Rights and Freedoms*. Certainly arguments could be made that as Section 52(1) provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect," and as aboriginal rights are protected by Section 35, any law which offended these rights would be invalid.

Nevertheless, there is presently no provision similar to Section 24 whereby a person whose aboriginal rights have been infringed or denied has the right to apply to a court for redress. Accordingly, a clause should be included in Part II of the Constitution providing that anyone whose rights are guaranteed by Part II of the Constitution shall have the right to apply to a court to obtain such remedy as the court considers appropriate.

Recommendation: That there be included in Part II of the Constitution provision that anyone whose rights are guaranteed by Part II of the Constitution shall have the rights to apply to a court to obtain such remedy as the court considers appropriate.

VII Amending Formula

Part V of the *Constitution Act* provides for the Procedure of Amending the Constitution of Canada. Briefly stated, an amendment requires the resolution of the Senate and the House of Commons and resolutions of the Legislative Assemblies of at least two-thirds of the provinces that have at least fifty per cent of the population of all the provinces. It is immediately evident that there is no provision for consultation with native people concerning an amendment which might affect aboriginal rights.

Part II of the Constitution should include a section which provides that the aboriginal and treaty rights recognized and affirmed by the Constitution shall not be subject to amendment without the consent of the aboriginal peoples of Canada, thereby removing aboriginal rights from the general amending formula.

Recommendation: That Part II of the Constitution include a section providing that no amendment which affects aboriginal rights or aboriginal peoples shall be made without the consent of native organizations.

VIII Culture and Language

Any proposed list of aboriginal rights would include reference to the preservation of the cultural heritage of the aboriginal peoples. The Constitution, as it is presently written, recognizes English and French as the official languages of Canada and from that recognition flow certain language education rights. Similar privileges should be afforded to aboriginal languages.

The Constitution should specify that the aboriginal peoples have the right to preserve and enhance their culture and language and should have the right to receive education in their own language where it is warranted by population. Such a concept is extending to the aboriginal peoples protection no greater than that presently given to English and French speaking students in Canada. The aboriginal peoples deserve equal treatment in the area of language education rights.

Recommendations: That the Constitution provide the aboriginal peoples have the right to preserve and enhance their culture and language and to enjoy language education rights where warranted by population.

IX Political Representation

Aboriginal people deserve a voice in the governments of this country, both at the Federal, Provincial and Territorial levels. At the present time, the native peoples make up the majority of the population in the Northwest Territories and that majority is reflected in the Legislative Assembly. However, given the projected growth of the non-renewable resource industry in the Territories and the potential influx of non-natives to the north, the demographic balance might well shift in the future.

In order to guarantee native representation in Federal, Provincial and Territorial levels, a formula should be established to create a specified number of aboriginal seats in the House of Commons and the Provincial and Territorial Assemblies. Voting for these seats should be by a separate roll composed of aboriginal voters. This system is designed to ensure that the representatives for the aboriginal peoples can be true spokespersons for the native interests and are not confined to being seen as politically acceptable to a non-native electorate. Aboriginal people would also be permitted to run as regular candidates. The procedure is similar to the political system of New Zealand which sets aside four of the 92 House of Representative seats for Maoris who are elected by an aboriginal electorate.

The minimum number of seats allotted could be increased in the same ratio to which the aboriginal population bears to the non-native population in each jurisdiction. This concept parallels that of India whereby seats in the House of the People are reserved for the Scheduled Castes and the Scheduled Tribes. The number of seats reserved in any state bears the same proportion to the total number of seats allotted to that state in the House of the People as the population of the Scheduled Castes or Scheduled Tribes in the state bears to the total population of the state.

Regard should also be had to the provision for aboriginal representation in the Senate and it is suggested that aboriginal peoples be guaranteed at least one senatoral seat for each province and territory, thereby giving aboriginal peoples representation on both levels of the Federal government of this country.

Recommendation: That the Constitution provide for guaranteed representation of aboriginal peoples in the House of Commons, Provincial and Territorial Legislative Assemblies and the Federal Senate.

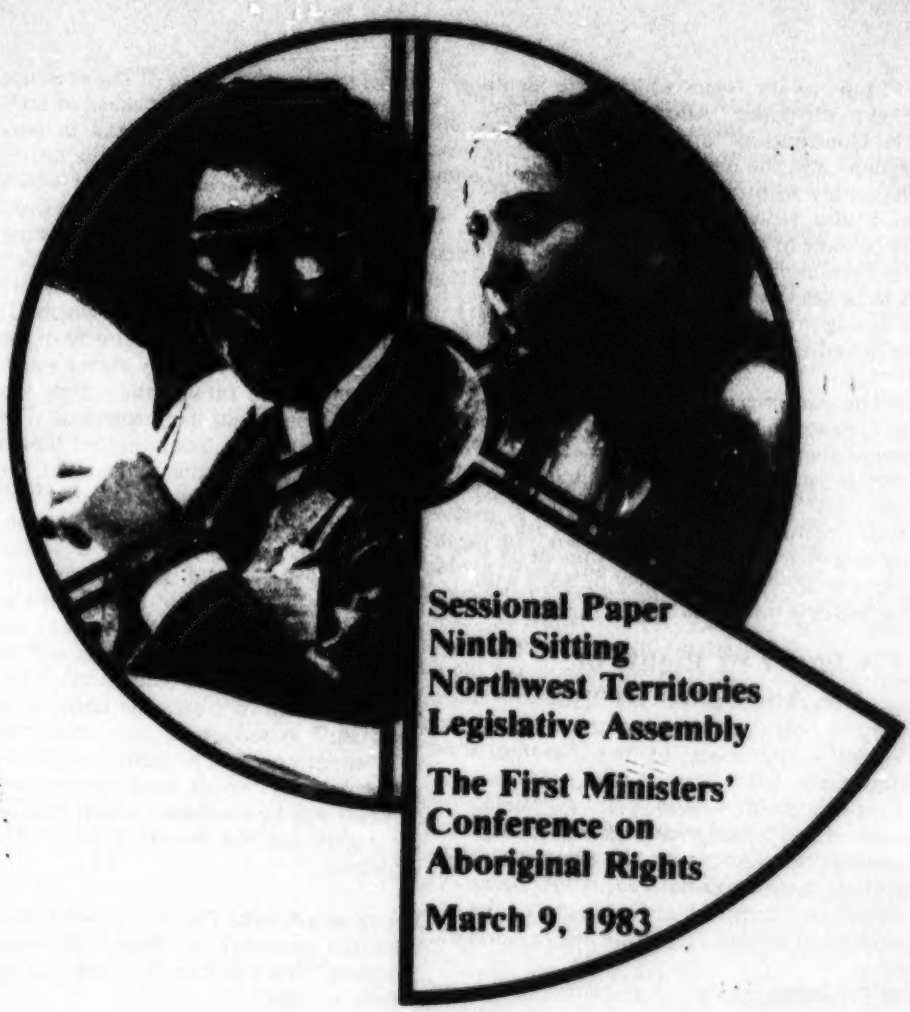
X Ongoing Process

The Government of the Northwest Territories should not find itself in the position of defining aboriginal rights; and native people of this country are well able to do that themselves. What is required is that these rights, however defined, are entrenched in the Constitution so that they are not infringed or denied by Federal or Provincial legislation.

Due to the complexity of this issue, it is unrealistic to expect that the aboriginal rights question will be resolved. It is therefore necessary that the Constitution provide for a First Ministers' Conference to be held within a specified time to continue to address the aboriginal rights item.

Only by including the requirement in the Constitution can the aboriginal peoples be assured that the aboriginal rights issue will not be forgotten after the First Ministers' Conference in the spring of 1983.

Recommendation: That the Constitution provide for an ongoing process to deal with aboriginal rights and that a first ministers' meeting be held within a specified time period to deal with this matter.



Sessional Paper
Ninth Sitting
Northwest Territories
Legislative Assembly

The First Ministers' Conference on Aboriginal Rights

March 9, 1983

After tabling the paper "Aboriginal Rights and the Constitution" with the Legislative Assembly in November 1982, the Executive Committee undertook to return to the Assembly with a second paper when the issues for the First Ministers' Conference on aboriginal rights had crystallized. At this time, the Executive Committee is putting forward this paper to seek direction from the Assembly on the issues which have evolved from the preparatory meetings of government ministers and officials with leaders of native organizations.

At the Ministers' meeting held in Ottawa on February 28th to March 1st, 1983, an agenda for the First Ministers' Conference was jointly introduced by the leaders of the organizations representing the aboriginal peoples. This agenda has been given approval and will be recommended to the First Ministers as the working document for the Conference. However, it does not necessarily mean that these are the only items which will be discussed, or that all of the issues on the agenda will be dealt with. Only two days will be devoted to the discussion of aboriginal rights topics.

Many of the issues which were identified in the paper "Aboriginal Rights and the Constitution" appear on the current agenda and the positions adopted by the Assembly with regard to those items are still valid. However, due to the complexity of some of these issues, such as guaranteed representation in Parliament, several will be seen as items best dealt with in an ongoing process where the matters can be reviewed in greater detail.

The purpose of this paper is therefore to apprise the Members of the current status of the talks, and to seek direction on certain issues which will be discussed at the First Ministers' Conference. This paper consists of a short review of the agenda items and an indication of how some of the items will likely be dealt with by the first ministers.

1. Charter of Rights of the Aboriginal Peoples

The Government of the Northwest Territories has indicated that it favours Part II of the *Constitution Act 1982* being entitled the "Charter of Rights of the Aboriginal Peoples" and being expanded to include a non-exhaustive list of rights which are identified as belonging to the aboriginal people.

a) Preamble

The GNWT has supported the idea of including in Part II a preamble recognizing the unique status of the aboriginal people and their contribution to the history of this country. The precise wording would have to be developed. There has been some opposition by the provinces to the idea of a preamble on the ground that it may be premature until such time as rights are identified.

b) Removal of "existing" in section 35

Section 35(1) of the *Constitution Act 1982* provides that the "existing" aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed. Despite repeated questioning by native leaders, federal and provincial representatives have not been able to clearly articulate the reason for the inclusion of the word "existing." The presence of the word is a legitimate cause of concern to the native people, and in particular to the native people of the north. Not only does it mean that rights which existed prior to the enactment of the Constitution will still be subject to existing federal legislation, but if the rights which are given constitutional protection are deemed to be only those rights which existed as of the date of the enactment of the *Constitution Act 1982*, any rights which may evolve from future land claims settlements would not be protected. The federal government has indicated that it will not consent to the removal of the word "existing" until rights are identified by the First Ministers' Conference as contemplated by section 37 of the *Constitution Act 1982*. As well, several provinces have stated that they will not consent to the removal of the word. Although at this time it is doubtful that this item will be resolved at the First Ministers' Conference, the GNWT sees the removal of "existing" in section 35 as a matter of vital importance to the native people of the territories where land claims settlements will be concluded which provide for rights for the beneficiaries of the settlement.

Recommendation: That the GNWT support the proposal to delete the word "existing" from section 35 of the *Constitution Act 1982*.

c) Statement of Particular Rights and Statement of Principles

The Government of the Northwest Territories has favoured the entrenchment in the Constitution of as many rights as can be agreed upon at the First Ministers' Conference. Results of the preparatory meetings have indicated that several of the provinces might be prepared to recognize some general principles, on the understanding that these principles would not be immediately translatable into enforceable rights. Rather, the statement of principles would provide the guidelines for discussion to take place under the ongoing process.

The GNWT would favour immediate entrenchment of rights such as the right to custom and language and the right to prac-

tice customary family law. Recognition could then be given to these rights in provincial and territorial legislation, thereby accommodating regional differences.

If a statement of principles is to be adopted, it should apply to those items on which agreements cannot be reached at the First Ministers' Conference and should be seen as interim measure until the matter can be thoroughly dealt with in the ongoing process.

d) Equality

There would appear to be general agreement by all parties that aboriginal rights should apply equally to male and female persons. The Federal Government has suggested an amendment to section 25 of the *Constitution Act 1982* to accomplish this end, and has indicated that it would not oppose the inclusion of appropriate wording in section 35 and it is suggested that amendments to this effect be made to both sections.

Recommendation: That section 25 and section 35 of the *Constitution Act 1982* be amended to provide that aboriginal rights apply equally to male and female persons.

e) Enforcement and Interpretation

The item of enforcement refers to the inclusion in the Constitution of a clause similar to section 24 giving any person whose aboriginal rights are infringed or denied the right to apply to a court for an appropriate remedy.

The native organizations have suggested a clause be added to section 35 to provide that a fair and liberal interpretation be given to the aboriginal rights clauses.

Recommendation: That the GNWT support the inclusion in the *Constitution Act 1982* of the following:

a) a clause giving aboriginal persons the right to seek redress in the courts for an infringement of aboriginal rights; and

b) a clause providing that provisions dealing with aboriginal rights be given a broad interpretation in keeping with the spirit of the Constitution.

2. Amending Formula

The Government of the Northwest Territories has favoured the inclusion of a clause in the Constitution to provide that amendments to the aboriginal rights provisions could not be made without the *consent* of the aboriginal people. It has become evident in the course of the preparatory meetings that the first ministers will be reluctant to grant a veto to a non-legislative body, especially since only the federal government has a veto under section 38 amending formula.

There appears to be a general consensus that the first ministers would be prepared to *consult* with native leaders before introducing any amendments affecting aboriginal rights. The Federal Government has suggested the convening of a First Ministers' Conference to which aboriginal leaders would be invited when amendments to the aboriginal rights section were contemplated. The federal draft does not provide for participation of the territories in such a conference despite the fact that several provinces have expressed support for territorial involvement.

Recommendation: In light of the opposition to a consent provision for aboriginal people in the amending process dealing with aboriginal rights, the GNWT should be prepared to support a *mandatory* consultation process which would include Yukon Territory and the Northwest Territories.

3. Self-Government

This item has caused some confusion at the preparatory meetings. Several provinces have given an outright rejection to the concept of sovereignty while others have been non-committal on the basis that they do not understand the issue.

Self-government will probably be an item which will be referred to the ongoing process. The federal government has proposed that a principle such as an entitlement to instititions of self-government be included in a preamble to a new section 37. Such a statement in the Constitution, while not enforceable in the courts, would represent a political commitment of the governments of this country to address this issue which is of fundamental importance to the aboriginal people.

4. Repeal of Section 42(1)(e) and (f)

It has been the position of the GNWT that section 42(1)(e) and (f) should be repealed. Section 42(1)(e) speaks of the possible extension of provinces into the territories without territorial consent. Section 42(1)(f) makes the establishment of new provinces subject to the general amending formula in the *Constitution Act 1982*.

Although the federal government has supported the repeal of both of these subsections, the provinces have resisted the attempt to limit the power which they acquired through the enactment of the *Constitution Act 1982*. Several provinces have suggested that the two subsections be treated differently. There has been some provincial agreement on an attempt to modify the language of section 42(1)(e), but there is a disinclination on the part of most provinces to assent to the repeal of section 42(1)(f).

At the last meeting of ministers, the GNWT circulated to the delegates proposed alternatives to these two subsections for discussion purposes only. With regard to section 42(1)(e), the alternative for discussion was the repeal of this subsection and the rewording of section 43 to provide for the consent of the legislative authority of the applicable territory prior to the alteration of the boundary between a province and the territory. There appears to be general support for such a rewording of section 43. However, if the proposed wording were not seen as acceptable from a provincial perspective, a similar objective could be obtained by allowing section 42(1)(e) to remain in its present form, but making it a precondition that a resolution of consent be adopted by the appropriate legislative authority of the territory prior to any amendment being made which provided for the extension of a province into the territory.

In the face of strong opposition from the provinces to the repeal of section 42(1)(f), the GNWT has proposed for discussion a three part amendment involving the rewording of section 38, section 42 and section 46. The proposal involves the amendment of section 46 to permit a territory, in addition to Parliament, to initiate an amendment to establish a new province in a territory. In addition, section 42 would be amended to provide that no amendment to establish the new province could be made unless a constitutional conference were held consisting of the Prime Minister, the First Ministers of the provinces and the elected representatives of the government of the territory seeking provincehood. Finally, any such amendment would still be subject to the amending formula, but the territory seeking provincehood would be deemed to be a province for the purposes of giving consent under the amending formula. On the last point and on the ability of the territory to initiate the amendment, there may be provincial opposition and it may be necessary to seek a compromise on this position.

One further aspect of this issue requires mention. By the terms of section 41 of the *Constitution Act 1982*, any amendment to Part V (which includes section 42) requires the consent of the Senate, the House of Commons and *each* of the provinces. It is important to note that if one province refused to pass a resolution, or refused to put the matter before its legislative assembly, the GNWT proposal would fail notwithstanding that it has support from the Federal government and all other provinces.

Recommendation: Re: section 42(1)(e) That the GNWT seek an amendment to section 42(1)(e) of the *Constitution Act 1982* as follows:

a) the repeal of section 42(1)(e) and the rewording of section 43 to provide for the consent of the legislative authority of the territory prior to the alteration of a territorial-provincial boundary.

Recommendation: Re: section 42(1)(f) That the GNWT seek an amendment to section 42(1)(f) of the *Constitution Act 1982* to provide:

a) the right of a territory to initiate an amendment for the creation of a new province in a territory;
b) the holding of a First Ministers' Conference to include the selected representatives of the government of the applicable territory prior to any amendment being made to create a new province out of a territory;
c) in the case of an amendment to create a new province, the territory seeking provincehood to be deemed to be a province for purposes of the amending formula.

5. Amendments to Part III

This agenda item addresses the issue of equalization payments, cost sharing and delivery of services to aboriginal peoples. The issue to some extent involves a dispute between the federal government and the provinces as to the degree of responsibility in providing funding and services to native people.

The aboriginal groups have proposed that these items be included in Part III which speaks of political commitments to principles. Such commitments do not create rights and are not enforceable in a court of law. These matters will not be resolved at the First Ministers' Conference and will possibly be referred to the ongoing process. It would be hoped that ultimately, such commitments would be inserted in Part II so as to create enforceable rights.

6. Ongoing Process

The GNWT has supported the entrenchment in the Constitution of an ongoing process to provide for future first ministers' conferences to deal with aboriginal rights. The Federal Government and some provinces have suggested amendments to section 37 to provide for a series of conferences within the next few years. At this point, the suggestions have ranged from one conference every year for five years to one every two years for six years. The exact number and time frame appear to be negotiable. The GNWT has supported the proposals which provide for more frequent meetings, on the understanding that such first ministers' conferences should not preclude work at the officials level as well as bi-lateral negotiations between governments and native organizations.

While the Federal Government and most provinces have indicated that they favour an entrenched process, British Columbia has suggested that in lieu of an amendment to the Constitution, an accord be signed by all parties at the conclusion of the First Ministers' Conference. The terms of the accord would commit the parties to participation in an ongoing process. The Executive Committee proposes that the Legislative Assembly agree to such an accord on the clear understanding that it was an interim measure until such time as an amendment to the Constitution could be passed. In this sense it might be useful in light of the time delay involved to effect an amendment. Furthermore, section 39 of the *Constitution Act 1982* provides that a proclamation shall not be issued amending the Constitution *before the expiration of one year* from the adoption of the resolution initiating the amending procedure, unless the Legislative Assembly of *each province* has previously adopted a resolution of assent or dissent. If one province refused to refer a proposed amendment to its legislature, the amending process would be in limbo for a minimum of one year.

Recommendation:

1) That the GNWT seek the entrenchment of the ongoing process in the *Constitution Act 1982*.
2) That if an accord is to be signed, it should state that it is an interim measure and the accord should also contain an undertaking by governments that they will, at the earliest possible time, refer the matters contained in the accord, including the entrenchment of an ongoing process, to their respective legislatures for consideration.

Northwest Territories Information

Press Release: Executive Committee Supports Constitutional Accord

March 17, 1983

YELLOWKNIFE (March 17) — The Executive Committee of the NWT will introduce a formal motion to the Legislative Assembly in May in support of the constitutional amendments on aboriginal rights agreed to at the First Ministers' Conference.

Elected Leader of the Executive Committee George Braden signed the Accord on behalf of the Government of the Northwest Territories. The agreement was also signed by the Government of Canada, nine provinces, Yukon Territory and four aboriginal groups.

The Accord and its schedule, which is in the form of a resolution to be introduced in the federal and provincial parliaments, is directed at amending the constitution to require further constitutional conferences to consider aboriginal rights. It would also guarantee aboriginal and treaty rights equally to male and female persons and protect rights that may be acquired in future land claims agreements.

Mr. Braden said that he was pleased to see achievement of an Accord at this first meeting to consider amending the new Canadian Constitution.

"As well as guaranteeing an on-going process to deal with the entrenchment of aboriginal rights, good progress was made in educating the provinces and the Canadian public on the needs and aspirations of aboriginal people," he said.

"There was a lot of hard work done during the formal sessions and behind the scenes by NWT people in our government's delegation and those of aboriginal groups."

In addition to Mr. Braden, the Territorial Government was represented by James Wah-Shee, minister of aboriginal rights and constitutional development and Dennis Patterson, associate minister of aboriginal rights. Richard Nerysoo, minister of renewable resources and energy, was also part of the NWT Government delegation.

Mr. Braden pointed out two other areas of concern to the NWT Government. The matter of repealing parts of section 42, involving extension of provincial boundaries and provincial jurisdiction over creation of new territories, was left in the agenda for consideration at the future conferences. Also, the Accord will in no way prejudice bi-lateral land claims negotiations.

The Accord states that elected representatives of the Government of the NWT will take part in preparatory meetings for the future constitutional conferences. Attendance at the First Ministers' Conferences will still be at the invitation of the Prime Minister.

NEWS NEWS NEWS

First Ministers' Report
Photo Credits: Dan Mandin,
Native Press
Dave Miller, GNWT

ISBN 0-7708-2009

Northwest Territories Information